

AUG 2 1943

CHARLES ELMORE CROPLEY  
CLERK

**In the Supreme Court of the United States**

**OCTOBER TERM, 1943.**

**No. 219**

**In the Matter of  
THE ALLIED PRODUCTS COMPANY,  
Bankrupt.**

**CONTINENTAL CASUALTY COMPANY,  
Petitioner,**

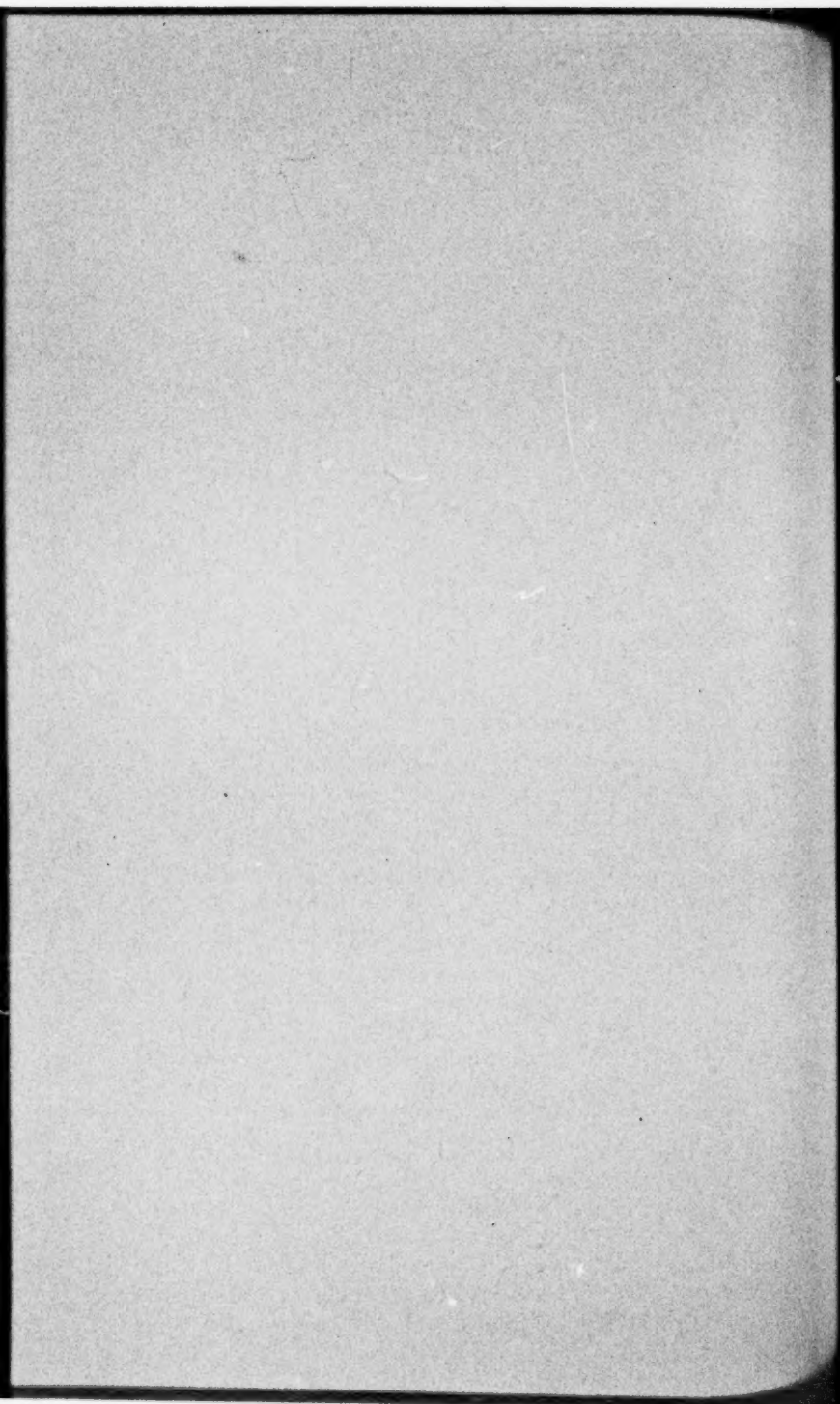
**vs.**

**HAROLD H. BARNETT, TRUSTEE,  
Respondent.**

**PETITION FOR A WRIT OF CERTIORARI  
To the United States Circuit Court of Appeals  
For the Sixth Circuit, and  
BRIEF IN SUPPORT OF PETITION.**

**LLOYD F. LOUX,  
Attorney for Petitioner.**

**ORGILL, MASCHKE, WICKHAM, DUFFY & LOUX,  
H. FRANK VAN LILL,  
1000 N. B. C. Bldg., Cleveland, Ohio,  
Of Counsel.**



## INDEX.

PETITION FOR A WRIT OF CERTIORARI.....	1
Summary Statement of the Matter Involved.....	1
Jurisdiction .....	3
Questions Presented .....	3
Reasons Relied On for the Allowance of the Writ....	5
BRIEF IN SUPPORT OF PETITION FOR CER- TIORARI .....	7
Summary .....	7
A. Opinions of the Courts Below.....	8
B. Jurisdiction .....	9
C. Statement of Case.....	9
D. Specification of Errors.....	9
E. Argument .....	11
Specification of Errors.....	12
(1) In making, adopting and affirming a finding of fact made by the Referee (a) when the case had been submitted on an agreed statement of fact which controlled the facts of the case, (b) which agreed statement of fact showed no fact such as was found.....	12
(2) In the refusal of the Circuit Court to consider the case on the propositions of law submitted and in basing its refusal solely upon its un- willingness to disturb an unlawful and unjusti- fiable concurrent finding of fact by the referee and District Court such as is described in para- graph (1) of specification of errors.....	13
(3) In the Circuit Court's affirming of the District Court on the authority of the case cited in its opinion, which authority is to the effect that where there is a concurrent finding of fact by a referee and District Court, the Circuit Court will not set it aside on anything less than a demonstration of plain mistake.....	13

- (4) In determining the question of default under the bankrupt's assignment of retained percentage to the surety by reason of its failure to pay for material used in the work when payment was due, as a question of fact rather than as a question of law..... 15
- (5) The decision of the Circuit Court is in conflict with the rule of law laid down by the United States Circuit Court of Appeals of the Fifth Circuit in the case of *Employers Casualty Co. v. Rockwell County*, 35 S. W. (2) 692, which follows the general rule holding that failure of a contractor to pay bills for material when due is, as a matter of law, a default under the contractor's assignment of deferred payments to surety, the District Court and the referee in the present matter holding that default under similar circumstances is a question of fact and not of law, which holding the Circuit Court affirmed ..... 15
- (6) The decision of the Circuit Court in the present matter is in conflict with and has failed to apply the rule of law adopted by this Court in the case of *Nelson vs. Montgomery Ward Co.*, 312 U. S. 373, which holds that the effect of admitted facts is a question of law..... 16

#### AUTHORITIES CITED.

##### Cases.

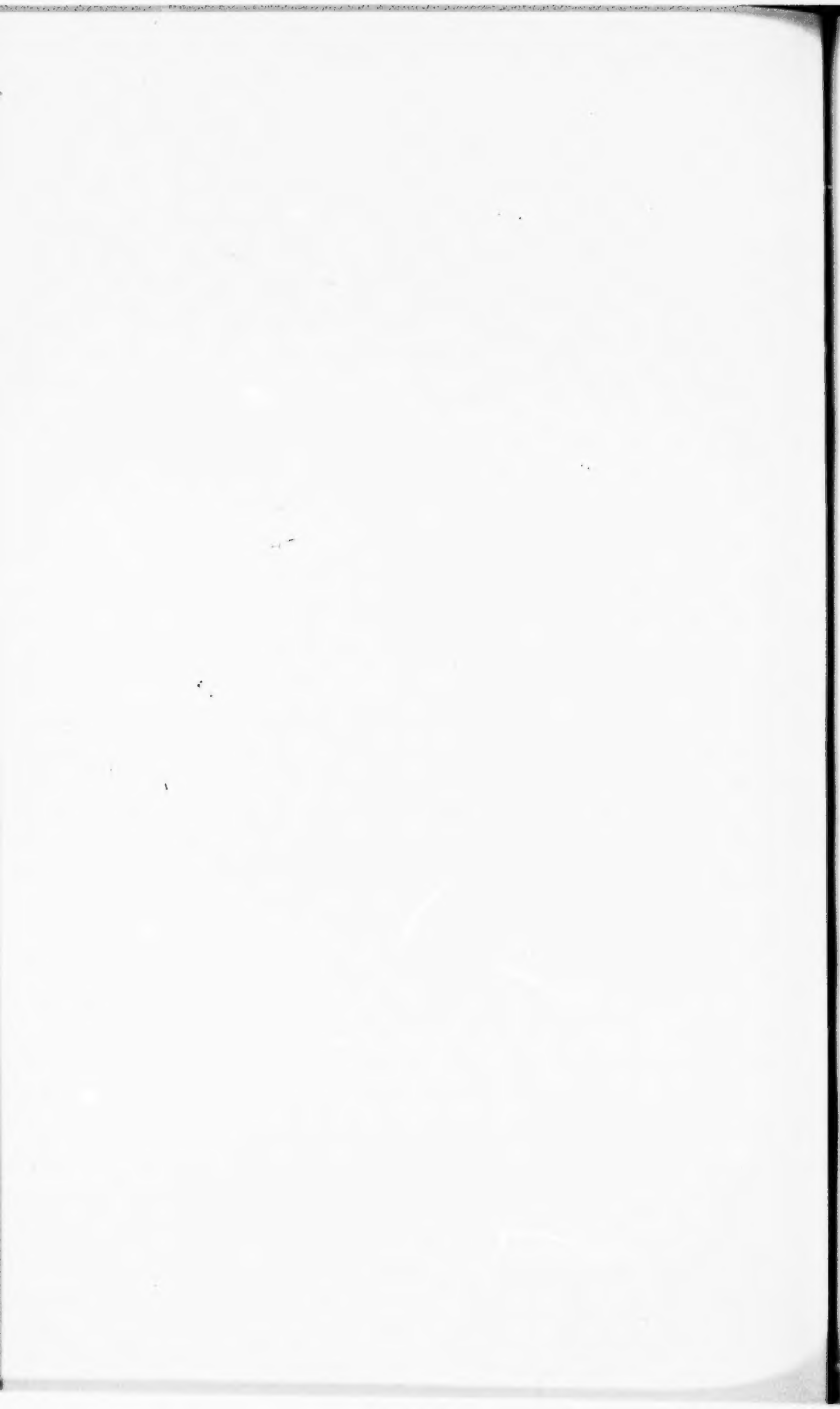
<i>Broadbury vs. Thomas</i> , 27 P. (2) 402 (Calif.).....	16
<i>Employers Casualty Co. vs. Rockwell County</i> , 35 S. W. (2) 690, 692 (Texas 1931).....	4, 10, 15
<i>Kowalsky vs. American Employers Ins. Co.</i> , 90 F. (2d) 476, 480 (C. C. A. 6).....	14
<i>McCarthy vs. Employers Ins. Co.</i> , 97 A. L. R. 292 (Annot.) (Mont. 1934).....	13
<i>Nelson vs. Montgomery Ward Co.</i> , 312 U. S. 373.....	5, 10, 13, 16
61 F. (2) 14.....	13

### **Texts.**

2 <i>American Jurisprudence</i> , p. 384, par. 23, and other cases there cited.....	12
60 <i>C. J.</i> , p. 84, par. 78.....	13
60 <i>C. J.</i> , p. 1191, par. 985.....	13
25 <i>R. C. L.</i> , p. 1105, par. 13.....	13

### **Statute.**

Judicial Code as amended by the Act of February 13th, 1925 c. 229 (43 Stat. 938; 28 U. S. C. A. 347), Section 240(a) .....	3
--	---



# In the Supreme Court of the United States

OCTOBER TERM, 1943.

---

No. ....

---

In the Matter of  
THE ALLIED PRODUCTS COMPANY,  
Bankrupt.

---

CONTINENTAL CASUALTY COMPANY,  
*Petitioner,*

vs.

HAROLD H. BARNETT, TRUSTEE,  
*Respondent.*

---

**PETITION FOR A WRIT OF CERTIORARI**  
**To the United States Circuit Court of Appeals**  
**For the Sixth Circuit.**

---

## **SUMMARY STATEMENT OF THE MATTER INVOLVED.**

The Bankrupt, a road construction company, executed three contracts of indemnity, similar in condition, to its surety, the Continental Casualty Company, the appellant, on three separate construction contracts with the State of West Virginia. (R. 7, 22.)

The first (Nicholas County) was completed without loss in December, 1938, and on which there was a balance

of \$2,466.04 due the contractor. (R. 22.) The second (Jackson County) was completed without loss in November, 1938, and on which there was a balance due the contractor of \$3,746.45. All bills for material on both contracts were paid by the contractor and there was no default thereunder. (R. 23.)

The third contract (McDowell County) was completed November, 1939, the contractor failing to pay for material bills when due in the sum of approximately \$13,884.66, which Continental paid. The Trustee in Bankruptcy, upon the Court's order, turned over to the Continental the sum of \$9,875.88 on account thereof, this latter being the balance of the contract price for the work which was completed. (R. 23.)

The loss of the Surety on the third contract was in excess of \$4,008.78 and it was to make good this loss that it endeavored to obtain the balances due from the State of West Virginia under the first two contracts above described.

Under the Indemnity Agreements the contractor, the Bankrupt, assigned to Continental, the surety, the amounts due it under the three contracts, to become effective, however, only upon a breach of the contracts or any bonds or a default in discharging its liabilities and paying its material bills when due. Both the Continental and the Trustee in Bankruptcy claimed the retained balances arising out of the two contracts completed without loss.

The case has been submitted throughout on an Agreed Statement of Fact. (R. 21.)

The Referee found as a fact that there was no default by the Bankrupt in failing to pay for material when due, and held against Continental. (R. 31.) The District Court, after stating in effect that if there had been a default shown, it would have found in favor of Continental, said, "The Referee's finding (of fact) that there was no de-



fault is determinative of the case." (R. 46.) It also overruled Continental's Petition for Rehearing.

The Circuit Court of Appeals affirmed the District Court on the sole ground that where there has been a concurrent finding of fact by the Referee and the District Court, the Circuit Court will not disturb such finding of fact unless plain mistake is shown, which showing Continental did not make (R. 66). Petition for Rehearing was denied May 31st, 1943.

It is to correct and reverse these erroneous rulings that this Petition for Certiorari is filed.

### **JURISDICTION.**

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13th, 1925 c. 229 (43 Stat. 938; 28 U. S. C. A. 347). The decree of the Circuit Court of Appeals was entered April 8th, 1943. (R. 59.) Petition for Rehearing was denied May 31st, 1943. (R. 79.) This Petition for Certiorari is filed in this Court before the expiration of three months from May 31st, 1943.

### **QUESTIONS PRESENTED.**

We are asking the exercise of the discretionary power of this Court to the end that the following questions may be resolved.

(1) Whether the Referee or the District Court has the right to ignore an agreed statement of fact upon which a case is submitted and to make a finding of fact other than and beyond any fact contained in the agreed statement of fact upon which a case is submitted. In the instant case the Referee made and the District Court approved and adopted a finding of fact contrary to the agreed statement of fact and contrary to the rule of law of the various States and the Federal jurisdiction.

(2) Whether the Circuit Court of Appeals was correct in its refusal to consider the case on the merits of the propositions of law submitted, it having so refused, basing its decision solely on an unwillingness to disturb an unlawful and unjustifiable concurrent finding of fact by the Referee and District Court, such as is described in paragraph (1) of this Caption.

(3) Whether the Circuit Court of Appeals was correct in affirming the District Court on the authority of the cases cited in its opinion (R. 67), all of which authority was to the effect that where there is a concurrent finding of fact by a Referee and the District Court it will not be set aside on anything less than a demonstration of plain mistake, when, as in the present matter, the case was submitted on an Agreed Statement of Fact containing no statement of fact such as the District Court and Referee found, and the question determined as fact was one of law.

(4) Whether the question of default, under the Bankrupt's Assignment of Retained Percentage to the Surety, arising out of its failure to pay for material used in the work when payment was due, is a question of law or fact, the Circuit Court in the present matter having regarded the question of default under the circumstances mentioned as one of fact and not of law.

(5) Whether the Court of Appeals in the present matter is in conflict with the rule of law laid down by the United States Circuit Court of Appeals of the Fifth Circuit in the case of *Employers Casualty Co. vs. Rockwell County*, 35 S. W. (2) 690, 692 (Texas 1931) which follows the general rule, and which holds that failure of a contractor to pay bills for material when due, as a matter of law, is a default under contractor's assignment of deferred payments to surety, the Court of Appeals, the District Court and the Referee, in the present matter, holding that default under similar circumstances is one of fact and not of law.

(6) Whether the Court of Appeals in the present matter is not in conflict with and has failed to apply the rule of law adopted by this Court in the case of *Nelson vs. Montgomery Ward Co.*, 312 U. S. 373, which holds that the effect of admitted facts is a question of law.

**REASONS RELIED ON FOR THE ALLOWANCE  
OF THE WRIT.**

The Petitioner respectfully submits, as its reasons for the allowance of the writ, that:

(a) The decision of the Circuit Court of Appeals is in conflict with the decision of another Circuit Court of Appeals (Fifth Circuit) on the same question as that involved herein.

(b) The decision of the Circuit Court of Appeals decides a question in a manner in conflict with applicable decisions of this Court.

(c) The decision of the Court of Appeals has decided an important question of general law in a manner untenable and in conflict with the overwhelming weight of authority.

(d) The questions involved herein are of importance, as they will arise on every occasion on which a case is tried on agreed facts, or in which indemnity assignments of retained balances of contract price to sureties are the basis of the action.

Wherefore, your Petitioner respectfully prays that a writ of certiorari be issued to the United States Circuit of Appeals for the Sixth Circuit, commanding that Court to certify to this Court, for review and determination the full and complete transcript of the record and proceedings in the case entitled *Continental Casualty Company, Appellant, vs. Harold H. Barnett, Trustee, etc., Appellee (In re Allied Products Company, In Bankruptcy, etc.)*, being cause No. 9301 on the docket of the said Court of Appeals, and that

the decree of the said Court of Appeals in said cause may be reversed by this Court, and that your Petitioner may have such other and further relief in the premises as to this Honorable Court may seem just and proper.

CONTINENTAL CASUALTY COMPANY,

LLOYD F. LOUX,

*Attorney for Petitioner.*

ORGILL, MASCHKE, WICKHAM, DUFFY & LOUX,

H. FRANK VAN LILL,

1000 N. B. C. Bldg., Cleveland, Ohio,

*Of Counsel.*

